

The parties were unable to agree upon the nature and extent of disability claimant suffered as a result of his work-related injury on January 31, 2003. The Administrative Law Judge (ALJ) found claimant sustained a 7.5 percent whole person functional impairment to the low back and a 1 percent whole person functional impairment for each knee. The ratings combined for a 9.5 percent whole person functional impairment.

Claimant requests review of the nature and extent of disability. Claimant argues that Dr. Parmet's rating of 75 percent to each leg (equivalent to a 30 percent whole person functional impairment for each leg) should be adopted.

Respondent argues the ALJ's Award should be affirmed.

The only issue before the Board on this appeal is the extent of claimant's functional impairment as quantified by the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (AMA Guides) (4th ed.).<sup>1</sup>

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Roger Bettis worked as a truck mechanic for over nine years. On January 31, 2003, he sustained an injury and described it as follows:

We did it every day. I just went over there and got the wheel balancer for the front tires to balance the tires, the wheels on the truck, and all I did was just went over there and I pulled on it and it snapped.<sup>2</sup>

Claimant testified that after his right knee snapped he had pain and swelling. Respondent sent him to an industrial clinic for treatment. An MRI was performed and claimant was referred to physical therapy. An orthopedic surgeon, Dr. George Robinson, was recommended. The doctor continued the physical therapy regimen and also prescribed a knee brace. Claimant testified that he limped a lot and then his left knee and low back started hurting. He continued to work for respondent.

Upon a referral, claimant was examined and evaluated by Dr. Thomas Samuelson in June 2003 due to complaints of pain in both knees and back. On January 27, 2004, Dr. Samuelson performed surgery on claimant's right knee. The doctor ordered physical therapy. Claimant continued to have pain in both knees and his back. He was last seen by Dr. Samuelson on July 6, 2005.

Respondent referred claimant to Dr. Lowry Jones for additional medical treatment. The doctor recommended surgery on claimant's left knee but claimant was not able to

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<sup>1</sup> At the time of the regular hearing, the claimant continued to work and he did not allege entitlement to a work disability (a permanent partial general disability greater than the functional impairment).

<sup>2</sup> Bettis Depo. at 4.

commit to the surgery due to having a heart attack and high blood pressure. Dr. Lan Fotopoulos treated claimant's low back with a series of injections with no improvement.

Dr. Allen Parmet, board certified in occupational and aerospace medicine, examined and evaluated claimant on February 17, 2006, at claimant's attorney's request. The doctor took a history and reviewed medical records. X-rays were taken due to claimant's low back complaints. The x-rays demonstrated a Grade I spondylolisthesis at the L4-5 level. Upon physical examination, Dr. Parmet diagnosed claimant as having a meniscus tear in the right knee which had been surgically repaired but had degenerative changes as a residual of bad cartilage and chondromalacia. The doctor recommended an MRI of claimant's left knee due to a possible meniscus tear. And he also determined that claimant had spondylolisthesis at L4-5 and degenerative changes in his back but no radiculopathy at that time. Dr. Parmet opined that claimant's left knee and back problems would be compatible with the mechanism of his work-related injury.

Dr. Parmet testified:

Q. You've indicated mechanically that the limp on the right side or in his right leg and the altered gait altered the opposite side, which I assume is the left leg, and the low back due to unequal loading. Does that accurately summarize your opinion regarding causation?

A. That's correct. You have an ongoing mechanical overstress from the limping and the loading and so while Mr. Bettis indicated it was an acute injury, clearly he had an ongoing problem that was mechanically loading him. And with the chronic problem with the right knee, he offloads to the left and asymmetrically loads his back. Plus, he has this preexisting problem. The spondylolisthesis is probably a developmental issue but as you load you back, you make that worse. So the asymmetrical loading is going to accelerate that far beyond what it would just from aging.

Q. The asymmetrical loading is from the limp or antalgic gait?

A. That's correct.

Q. And that started with the 2003 injury to his right knee.

A. Apparently he was doing well up till that time after the first surgery but after that time, he continued to have loading problems.<sup>3</sup>

On August 29, 2008, claimant was again examined and evaluated by Dr. Parmet. The doctor reviewed additional medical records of Drs. Jones and Fotopoulos as well as MRI films of claimant's lumbar spine and left knee. Dr. Parmet diagnosed claimant as

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<sup>3</sup> Parmet Depo. at 9-10.

having spondylolisthesis, degenerative changes with neuroforaminal compromise and continuing low back pain.

In a letter dated November 4, 2008, Dr. Parmet opined that claimant was in need of bilateral total knee replacements or arthroscopies which resulted in a 75 percent impairment to each knee based on the *AMA Guides*<sup>4</sup>. The doctor also rated claimant's low back at 10 percent to the body as a whole due to pain, anatomical changes, spondylolisthesis and degenerative changes present.

On cross examination, Dr. Parmet opined that claimant's 10 percent impairment to the low back was consistent with the DRE Lumbosacral Category III in the *AMA Guides*. He also agreed that a 5 percent rating with no radiculopathy was a Category II. The doctor testified that claimant fell between the 5 and the 10 percent rating.

And Dr. Parmet explained that his ratings to the knees were based upon the section of the *AMA Guides* that is utilized after a total arthroplasty with a bad result. But he further testified that if he put together a variety of factors he could end up with a rating that would be virtually identical to a total arthroplasty with a bad result. He testified:

Q. But approaching an impairment rating on each knee other than on the basis of a knee replacement results in what impairment rating per the *AMA Guides*, Fourth Edition?

A. It really looks the same when you put in the gait, the crepitus, the arthritis, the weakness. All those factors have to be put in together as per 3.2 and you end up with something that's virtually identical to a total arthroplasty with a bad result.<sup>5</sup>

Dr. Vito Carabetta, board certified in physical medicine and rehabilitation, examined and evaluated claimant on April 6, 2009, at the request of respondent's attorney. The doctor reviewed the medical records that were provided as well as obtained a history from the claimant. Upon examination, Dr. Carabetta did not find any radiculopathy as well as a grinding or clicking sensation in his knees. Dr. Carabetta diagnosed claimant as having status-post right knee partial meniscectomy, left knee medial meniscal tear and low back pain. The doctor opined that claimant had reached maximum medical improvement at the time of his examination. Since claimant has been doing his usual work, the doctor opined that there was no need to impose any permanent restrictions.

Based on the *AMA Guides*, Dr. Carabetta rated claimant's low back and both knees at a 7 percent whole person impairment. The right knee was given a 1 percent due to a

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<sup>4</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

<sup>5</sup> Parmet Depo. at 24.

partial medial meniscectomy and the left knee was given the same 1 percent rating. Claimant's low back was rated in the DRE Lumbosacral Category II for a 5 percent whole person impairment.

The sole issue is the extent of claimant's functional impairment. Functional impairment is the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the *AMA Guides to the Evaluation of Permanent Impairment*, if the impairment is contained therein.<sup>6</sup> The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.<sup>7</sup> It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony with the testimony of the claimant and others in making a determination on the issue of disability. The trier of fact must make the ultimate decision as to the nature and extent of injury and is not bound by the medical evidence presented.<sup>8</sup>

As previously noted, the parties do not dispute the ALJ's finding that claimant suffered a 7.5 percent whole person functional impairment to his low back. But claimant argues the ALJ erred in not adopting Dr. Parmet's rating to the knees.

The ALJ concluded that Dr. Parmet's ratings for claimant's knees were not appropriately based upon the *AMA Guides*. Dr. Parmet based his rating upon a total arthroplasty with poor result. Simply stated, claimant did not undergo such a procedure. And it is speculation to base his rating upon a poor result from such a procedure. Consequently, the ALJ adopted Dr. Carabetta's ratings for the knees. The Board agrees and affirms.

The Board is mindful that Dr. Parmet did testify that he could have utilized Section 3.2 of the *AMA Guides* to arrive at a 75 percent impairment to each knee. The difficulty with this general statement is that Dr. Parmet did not offer any explanation how he would specifically compute such a rating utilizing that section.

### **AWARD**

**WHEREFORE**, it is the decision of the Board that the Award of Administrative Law Judge Marcia L. Yates Roberts dated July 6, 2009, is affirmed.

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<sup>6</sup> K.S.A. 44-510e(a).

<sup>7</sup> *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

<sup>8</sup> *Graff v. Trans World Airlines*, 267 Kan. 854, 983 P.2d 258 (1999).

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of October 2009.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Philip R. Carson, Attorney for Claimant  
Wade A. Dorothy, Attorney for Respondent and its Insurance Carrier  
Marcia L. Yates Roberts, Administrative Law Judge